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REPORTS

The Office of the Trade Representative: Recent Legal Developments

International trade dominated newspaper headlines in the fall of 1985 as the growing U.S. trade deficit and strong dollar fueled intense concern about foreign markets closed to declining U.S. exports and rising levels of imports, some unfairly traded, into the United States. Protectionist congressional action seemed likely when members returned to Washington after the August 1985 recess. Yet an aggressive international trade action plan by the administration undercut the perceived need for legislation as a means to solve these problems. This article outlines the major legal issues that developed in 1985-86 regarding the administration's trade initiatives, and some of the legislative issues that remain.

I. New Multilateral Trade Negotiations

The Office of the U.S. Trade Representative is charged broadly with establishing U.S. trade policy and conducting trade negotiations, in consultation with other government agencies as appropriate. As the chief U.S. trade negotiators, the trade representative and his staff engage in almost continual negotiations. Bilaterally the United States never ceases to pursue several, often many, issues with each of our major trading partners. Multilateral trade negotiations are more intermittent, however. Since the conclusion of the General Agreement on Tariffs and Trade (GATT) in 1947, the major developed and developing countries have engaged in seven sets or "rounds" of such negotiations. The first six aimed primarily to reduce tariff levels, which originally were the major obstacles to freer trade among nations. The most recent Tokyo Round (so-called because the meeting of trade ministers launching these ne-

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gotiations was held in Tokyo) aimed additionally to reduce nontariff barriers to trade—such as injurious subsidies or sales at less than fair value; discriminatory or nontransparent government procurement; arbitrary customs valuation methods; and protectionist health, safety and environmental standards.

While the Tokyo Round was helpful in reducing nontariff barriers, many barriers and problems remain. Ideally all nations would agree on new solutions for new problems, improved rules for old problems, and more reliable and effective dispute settlement procedures to ensure that these rules work. Therefore, the United States proposed a new round of multilateral trade negotiations intended to stem the worldwide tide of protectionism, liberalize further world trade conditions and practices, and thus preserve political support for freer trade.

Initially the United States proposals garnered little support from many of our trading partners. In particular, several developing countries opposed the new negotiations, especially the U.S. proposal to broaden the GATT to cover trade in services and investment. Yet in the summer of 1985, we prevailed in a special mail ballot—unusual in the GATT—to convene a special session of the Contracting Parties in September 1985, in addition to the regularly scheduled ministerial meeting in November 1985. At the latter session, we obtained agreement to establish a Preparatory Committee that would propose an agenda, objectives, participation and modalities, with a view to beginning negotiations in September 1986.

At a ministerial meeting in Punta del Este, Uruguay, the week of September 15, 1986, a comprehensive "Uruguay Round" of multilateral trade negotiations was formally launched. The agenda for the negotiations expressly includes the following subjects:

- *Agriculture.* Pursuant to the Ministerial Declaration on the Uruguay Round, the negotiations "shall aim to achieve greater liberalization of trade in agriculture" and to "bring all measures affecting import access and export competition under strengthened and more operationally effective GATT rules and discipline."
- *Trade Related Aspects of Intellectual Property Rights.* The Uruguay Round negotiations "shall aim to clarify GATT provisions and elaborate as appropriate new rules and disciplines" regarding intellectual property. Without prejudice to other complementary efforts that may be taken elsewhere, the negotiations will try, for example, to develop a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods.
- *Trade Related Investment Measures.* The negotiations will elaborate, as appropriate, any further GATT provisions necessary to avoid adverse effects on trade of investment measures.

- *Trade in Services.* Negotiations on services "shall aim to establish a multilateral framework of principles and rules for trade in services, including elaboration of possible disciplines for individual sectors." While these negotiations will be handled through a special negotiating group, GATT procedures and practices will apply to these negotiations and the group will report to the Trade Negotiations Committee, which will also receive reports on other Uruguay Round negotiations.
- *Dispute settlement.* The Uruguay Round negotiation "shall aim to improve and strengthen the rules and the procedures of the dispute settlement process," including the development of arrangements for monitoring compliance with adopted recommendations.

The ambitious agenda for the Uruguay Round also includes such items as subsidies and countervailing measures, safeguards, natural resources, tropical products, non-tariff measures, tariffs, Tokyo Round Codes, and other issues. The United States thus succeeded in establishing a broad agenda with the greatest possible likelihood of achieving significant reform and expansion of the GATT system to facilitate freer trade. The Ministerial Declaration calls for conclusion of the Uruguay Round within four years.

II. Canadian Trade Agreement

As already noted, trade negotiations never proceed in a single direction. Even as new multilateral negotiations formally began, the U.S. continued major bilateral trade talks with Canada. As with respect to the 1984 Israeli Free Trade Agreement, the administration would seek "fast track" legislation (subject to congressional approval or disapproval only, not amendment) for any such agreement. With this aim in mind, last fall the president notified the Senate Finance and House Ways and Means Committees of the administration's intention to begin such discussions. The administration narrowly avoided a rejection of the fast track option by the Senate Finance Committee, which in April came close to adopting a motion disapproving the trade talks.

The legal issues raised in connection with these talks have been and will continue to be extensive. For example, the legislative requirements for eligibility for fast track congressional consideration of any such agreement have been the subject of concern. Both new and longstanding disputes—such as the possible countervailability of Canadian provincial stumpage practices, and the basis for and consequences of Canadian federal rules about the acquisition of Canadian companies in cultural areas—require legal analysis. Legal actions involving Canada—such as the unfair trade investigation (under section 301 of the Trade Act of 1974) of Canadian restrictions on the export of unprocessed salmon and herring—will of course affect the bilateral negotiations. And existing arrangements

between the two countries—such as the Auto Pact—may require review. Like the New Round, this endeavor will require extensive legal advice—not only within the two governments, but also among the international trade bar counseling clients likely to be affected by any significant change in the bilateral trade rules.

III. Unfair Trade Cases

In its continuing effort to combat unfair trade practices, the administration has relied increasingly this past year on domestic legal measures. An early indication of our heightened resolve to take tough action when necessary was our retaliation against citrus tariff preferences by the European Community for certain Mediterranean countries, that discriminated against U.S. citrus exports to Europe. Unable to persuade the EC to eliminate this discrimination that burdens U.S. commerce, in retaliation we raised our tariffs on imports of pasta from Europe. The aim was to show the EC and other trading partners that if they deny us fair access to their markets, we are prepared to retaliate. While our preference is to expand access for our exports to foreign markets, retaliation (through closure of our market to foreign imports) must be a credible threat to provide leverage in market access negotiations. U.S. tariff increases on pasta imports from the EC reinvigorated this leverage.

In the fall of 1985 and early 1986, the president himself drew attention to the importance of free and fair trade. In addition to several speeches on general trade policy and particular trade issues, he directed the Trade Representative to take several unprecedented actions. First, in September and October 1985, the president mandated initiation on the government's own motion of investigations under section 301 of unfair trade practices by Brazil with respect to computers and "informatics" policies, Japan with respect to manufactured tobacco products, and Korea with respect to insurance services and inadequate intellectual property protection. He also directed the Trade Representative to recommend retaliation if he was unable to resolve, by December 1, long-standing disputes with the EC on its production subsidies for canned fruit (some of which the GATT had found to nullify or impair trade concessions to the U.S.) and Japan on quotas for leather and leather footwear (which the GATT had found, with respect to leather, to violate article XI).

In March the administration again resorted to section 301, this time in response to unfair quotas and agricultural tariff increases adopted by the EC in connection with Portugal's and Spain's entry into the EC. In lieu of an investigation, action (through retaliatory U.S. quotas

and suspension of tariff concessions) was ordered unless the EC promptly and properly compensated the U.S. for its unilateral tariff increases and eliminated its unjustified quotas.

In addition to such historical self-initiation of investigations and actions under section 301, the administration has also used two other legal weapons. For the first time, the U.S. acted under section 307 of the Trade and Tariff Act of 1984, regarding Taiwan's export performance requirements in the automotive sector. In approving recent Japanese automotive investments, Taiwan authorities had required the exportation of specified percentages of the cars produced there. Because export performance requirements distort trade and, in this case, were likely to result in increased U.S. imports, the U.S. investigated the Taiwan practices. Within four months, the U.S. concluded an agreement with Taiwan, under which the Taiwan authorities agreed: (1) to eliminate existing export performance requirements in the automotive sector by the summer of 1987; (2) not to impose new such requirements; and (3) to allow existing automotive investments to be expanded without being subjected to export performance requirements.

Moreover, for the first time the U.S. has, on its own motion, begun a fact-finding inquiry under section 305 of the 1974 Trade Act. Although section 305 was previously used only by private parties, at the president's express direction, the USG has undertaken an inquiry into a directive adopted by the European Community that could unfairly reduce U.S. meat exports to the EC.

In December the U.S. resolved both the EC canned fruit and Japan leather and leather footwear disputes. The EC agreed to eliminate its canning subsidies on peaches and to reduce them on pears. While Japan merely replaced its illegal quotas with equally objectionable tariff rate quotas, it compensated the U.S. through tariff bindings and reductions on other products significant to the U.S. Moreover, the U.S. also retaliated by raising its tariffs on certain leather and leather goods imported from Japan.

While all the other investigations and actions described above are still pending, the administrations's historic use of these legal weapons already has succeeded in opening foreign markets previously closed to U.S. exports. For example, in response to likely section 301 action, Korea agreed to liberalize its motion picture distribution market. In effect, self-initiation of 301, 305 and 307 actions, combined with vigorous pursuit of cases begun in response to U.S. industry petitions (such as the complaint about Japanese government semiconductor practices), has captured our trading partners' serious attention. We have underscored our commitment to more open markets and our resolve to retaliate if we are unable to achieve them. By this means we have increased our negotiating leverage and,

hopefully, the number and extent of foreign markets open to U.S. exports of goods, services and investment.

IV. National Trade Estimates Report

The Trade and Tariff Act of 1984 requires the Trade Representative annually to report to the Congress on significant barriers to U.S. exports of goods, services and investment. In consultation with other agencies, USTR submitted the first such report in October 1985. In his transmittal letter, Ambassador Yeutter stressed that not all the foreign government practices identified in the report are unfair. Some—such as high but GATT "bound" tariffs—are expressly sanctioned by current international trading rules. Others simply are not subject to any widely agreed current rules. Moreover, even some of the unfair practices are engaged in to some extent by the United States as well as its trading partners.

The report serves two important purposes. First, it helps the administration set its trade negotiating priorities. Second, it helps maintain pressure on the administration to pursue troublesome issues despite foreign government intransigence or our government's intermittent preoccupation with other bilateral issues. Once an annual report identifies a significant foreign barrier, the administration would like to be able to herald its elimination or at least progress toward its reduction in subsequent reports. Careful legal review of draft reports is warranted in view of their importance and possible subsequent action involving such trade barriers under U.S. trade laws.

V. Trade Legislation

Despite the vigor and success of the administration's trade action plan and its execution, some in the Congress felt that still tougher action is needed to open closed foreign markets and to protect the U.S. market against imports that are traded unfairly or that otherwise threaten the national security or seriously injure U.S. industry. As a result, many bills were introduced in the 99th Congress to amend various trade laws. Common objectives of many of these bills were:

- to eliminate or reduce Presidential discretion whether to provide relief where the International Trade Commission has found imports to be a substantial cause of serious injury to U.S. industry;
- to eliminate Presidential discretion whether to retaliate under section 301 in response to foreign government practices that violate trade agreements, or are inconsistent with other agreements and impose a burden or restriction on U.S. commerce;
- to expand the kinds of practices that would be considered unfair under section 301 and the countervailing duty law;

- to make section 301 function more automatically, along the lines of the U.S. countervailing duty and antidumping law;
- to require the president to make and report his decision in cases involving alleged threats by imports to the national security;
- to require retaliation if the president, within a specified time period, is unable to negotiate equitable access to foreign markets for telecommunications products;
- to reduce access to the U.S. market for imports from countries with substantial trade surpluses with the U.S.;
- to extend existing authority to implement on a fast-track basis nontariff barrier reductions, and to provide new authority to negotiate tariff reductions; and
- to improve protection for intellectual property rights.

The administration itself proposed a separate bill to provide better protection of intellectual property rights. However, it was unwilling to accept any trade legislation if accompanied by objectionable amendments to the trade laws. The administration could not support any of the major omnibus trade bills in the 99th Congress.

Nonetheless, the legislative process has required, and likely will continue to require, extensive participation by USTR lawyers. At both hearings and committee mark-up sessions, various members seek USTR's legal analysis of and position on bill provisions and proposals to amend those provisions. We have also drafted letters from the Trade Representative and other cabinet officials to members of Congress, expressing administration positions on trade issues. Even when ultimate passage of legislation appears unlikely, long working hours are devoted to ensuring that decisions are made on an informed basis and that the legal context and consequences of proposals are properly appreciated.

VI. Steel Program

In September 1984 the president declined to provide relief to the U.S. steel industry in the context of a section 201 escape clause case in which the ITC had determined that imports of some, but not all, steel products complained of were a substantial cause of serious injury to the U.S. industry. Instead, because of widespread unfair steel trading practices and the serious injury to U.S. industry, the president directed the Trade Representative to negotiate voluntary restraint arrangements (VRAs) with steel exporting countries. Since then the U.S. has concluded VRAs with eighteen countries that accounted for 80 percent of all steel imports into the U.S. Import penetration is now in the low twenty percentiles, as opposed to over 30 percent in the third quarter of 1984. Extensive legal

participation has been required in these negotiations to ensure precise drafting and accurate embodiment of the intentions of the parties.

VII. Other Issues

The Office of the U.S. Trade Representative in general and the General Counsel's office in particular have been absorbed in many, many other important issues including, for example:

- *Renegotiation of the Multifiber Agreement.* Textile quotas in developed countries established under the MFA are of paramount concern to developing countries that export textiles. Both the umbrella MFA and the subsidiary bilateral agreements are highly technical and require the greatest care in any redrafting.
- *Implementation of the Caribbean Basin Initiative.* In 1983 the Administration obtained legislation authorizing it to provide tariff preferences to the CBI countries. Continued implementation of this program has involved significant tariff classification issues (such as whether certain processing operations in CBI countries of products manufactured elsewhere constitute "substantial transformation"), new benefits for CBI textile imports, and review of the effects on this program of other developments such as enactment of the sugar provisions of the 1985 farm bill.
- *Review of the Generalized System of Preferences.* As required, USTR is reviewing the GSP program to redetermine whether certain countries and specific products should remain eligible for duty-free treatment under statutory criteria. Application of these criteria to particular facts requires legal analysis. InIn response to congressional concern, we also advised the Trade Representative about the inflation adjustment formula used in calculating GSP eligibility, which some had erroneously considered to result in greater eligibility and more duty-free benefits than warranted.
- *Tokyo Round Code Committee Sessions.* USTR represents the United States in regularly scheduled meetings of the signatories to each of the GATT Codes negotiated in the Tokyo Round. For example, we continue to discuss injury questions and methodology for less-than-fair-value determinations in the Antidumping Code Committee, and criteria for determining subsidies and their countervailability in the Subsidies Code Committee.
- *Agricultural trade.* Agricultural problems remain preeminent among trade concerns. While many are handled in the context of section 301 (such as the quotas and tariffs in connection with Portugal's and Spain's entry into the EC), all hopefully will be addressed in the New Round. Others are approached ad hoc in bilateral consultations, as was done with

respect to forest products in the MOSS (market-oriented, sector specific) talks with Japan.

- *Tax issues*. USTR provided advice about the trade effects of various tax reform proposals, such as the suggestion to eliminate the deduction for tariffs paid by businesses on imports.

VIII. Conclusion

Because of widespread concern about our trade deficit and a perception of diminishing U.S. industrial competitiveness, trade has been a major, presidential-level issue in 1985-86. That priority is likely to continue until the deficit substantially declines. Legal issues will likewise continue to abound in the trade area, particularly if the number of proceedings under U.S. trade remedy laws continues to increase and Congress remains interested in possible amendment of those laws.